

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THOMAS M. JAMES)
)
)
Plaintiff,) Case No.: 1:13-cv-541-WTL-TAB
v.)
)
DOCTOR ELI LORENZO and)
DOCTOR NICOLAS P. VILLANUSTRE)
)
)
Defendants.)
)

**DOCTOR NICOLAS P. VILLANUSTRE'S MOTION TO DISMISS COMPLAINT
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)**

COMES NOW, Nicolas P. Villanustre M.D. (“Defendant”), by counsel, and hereby requests that the Court dismiss Plaintiff Thomas M. James’ (“Plaintiff”) Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant would show the court as follows:

1. Plaintiff’s action against Defendant is an action in medical malpractice based upon alleged medical care that Plaintiff received from Defendant.
2. In Indiana, a plaintiff may only bring a medical malpractice action against a health care provider by first filing a Proposed Complaint (“Complaint”) before the Department of Insurance and then having a decision rendered by a medical review panel.
3. On February 23, 2009, Plaintiff filed a medical malpractice Complaint with the Indiana Department of Insurance against Defendant and other providers. *See Exhibit A* -Plaintiff’s Proposed Complaint.
4. Plaintiff filed the present Complaint in this Court on September 25, 2009.
5. The present Complaint filed in this Southern District Court of Indiana involves the same issues presently asserted against the Defendant in the Complaint that was filed by Plaintiff before the Department of Insurance on February 23, 2009.

6. A medical review panel had not rendered a decision on Plaintiff's medical malpractice Complaint at the time Plaintiff filed the present Complaint in this Court. Accordingly, this Court lacked subject matter jurisdiction over Plaintiff's Complaint at the time Plaintiff's Complaint was filed in this Court.

7. Moreover, on August 3, 2011, a State Court dismissed Plaintiff's medical malpractice Complaint filed on February 23, 2009 against Defendant and other providers, with prejudice. *See Exhibit B* - State Court Dismissal.

8. On October 5, 2011, the Court of Appeals in Indiana affirmed the trial court's order dismissing Plaintiff's Complaint, with prejudice. *See Exhibit C* - Court of Appeals Order.

9. Accordingly, Plaintiff's Complaint must be dismissed since this Court lacked subject matter jurisdiction over this Complaint at the time that it was filed. Furthermore, this Complaint must be dismissed because Plaintiff's action is barred under the doctrine of res judicata since the present action is an identical action against Defendant and involves the same issues that Plaintiff asserted in a state court action, which was dismissed.

WHEREFORE, Defendant Nicolas P. Villanustre, by counsel, respectfully requests the Court dismiss this action against Defendant and for all other proper relief in the premises.

Respectfully submitted,

/s/Gerald B. Coleman
Gerald B. Coleman, #16009-49
Coleman Stevenson & Montel, LLP
9101 Wesleyan Road, Suite 100
Indianapolis, Indiana 46268
Telephone: (317) 875-0400
Facsimile: (317) 802-0900
Email: gcoleman@csmlegal.com

*Attorney for Defendant Doctor
Nicolas P. Villanustre*

Before the Department of Insurance
State Of Indiana

Thomas M. James / 98106
Plaintiff(s)

vs

GEO Group/Jeffery Wright/CMS
Medical (n.c.e.p.) / Dr. Eli (n.e.p.)
(Dr. John Doe) Wishard Hospital

Defendant(s)

FILED

FEB 23 2009

STATE OF INDIANA
DEPT. OF INSURANCE

PROPOSED COMPLAINT FOR DAMAGES

Comes now the Plaintiff(s), Thomas M. James, AOC # 98106, and for his/her complaint for damages against the Defendant(s), states as follows:

1. That Plaintiff Thomas M. James was a patient of the Defendant(s), GEO Group (n.c.e.p.) at Medical Dept. (C.M.S) as Dr. Eli and Dr. John Doe at Wishard Hospital, from 10/27/07 through 1/10/07, and received medical care and/or treatment from Defendant(s). (C.M.S) medical Dept. Dr. Eli and from Dr. John Doe at Wishard Hospital in Indianapolis, Indiana.
2. Said medical care or treatment rendered by Defendant(s) was negligent and below the appropriate standard of care. Because Doctors failed to timely address the injury and failed to contact Plaintiff in 10 week window,
3. That as a proximate result of the negligence of the Defendant(s), the Plaintiff(s) Thomas M. James, has/have incurred medical expenses, additional treatment, related expenses, lost wages and/or Life Thruing intangible damages of a nature as to require compensation. Superintendent - Jeffery Wright is responsible for all compensatory damages.

WHEREFORE, the Plaintiff(s) respectfully pray(s) for an award against the Defendant(s) in an amount that will fairly and fully compensate Plaintiff(s) for all losses, injuries and damages, for the costs of this action, and for all other just and proper relief.

EXHIBIT

tabbed

A

Respectfully submitted,

Thomas M. Janes

Mary F. Janes

Phone: (520) - 408-8240

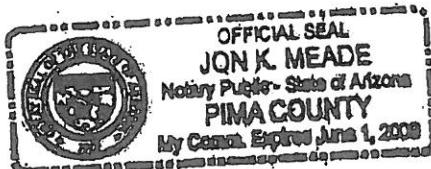
Address: ~~ASPC-Tucson Front-Rm 2~~

Date: 2/5/2009

P.O. Box 24496

Tucson, Arizona, 85734

Subscribed and Sworn to me: February 5th, 2009



Jon K. Meade
Notary Public:

June 2009
My Commission Expires:

Thomas M. Janes

Thomas M. Janes
ADC # 98106 / Claimant

Note:

I, Thomas M. Janes, ADC # 98106, never received the final notice dated on 2/5/2008 by the medical malpractice division, from Stephanie mostly, claims processor.

Thomas M. Janes

98106

STATE OF INDIANA)
COUNTY OF MARION) SS:
IN THE MARION CIRCUIT COURT
CAUSE NO. 49C01-1105-CT-018677

COMMISSIONER OF THE INDIANA DEPARTMENT)
OF INSURANCE,
Petitioner,

v.

THOMAS M. JAMES,
Respondent/Plaintiff

v.

GEO GROUP, JEFFREY WRIGGLES, CMS MEDICAL)
(NCCCP), JOHN DOE, WISHARD HOSPITAL,
Defendants, Interested Non-Respondents.)

FILED

161

AUG 03 2011

Lydia L. White
CLERK OF THE MARION CIRCUIT COURT

ORDER OF DISMISSAL PURSUANT TO I.C. 34-18-8-8 AND TRIAL RULE 41(E)

Petitioner, by counsel, filed his Motion To Dismiss For Failure To Prosecute.

Respondent/Plaintiff ("Respondent") was served with the Motion on or about May 20, 2011, and he has not responded thereto. Respondent having failed to show sufficient cause why his proposed complaint should not be dismissed with prejudice, Petitioner's Motion is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that RECOMMENDED FOR APPROVAL
Respondent's Proposed Complaint is hereby DISMISSED WITH PREJUDICE.

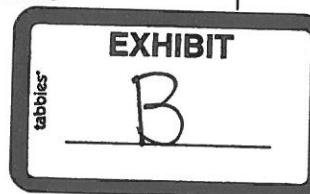
SO ORDERED this 3rd day of August, 2011:

Mark A. Jones
Mark A. Jones APPROVED AND ORDERED
Master Commissioner COMMISSIONER

Karen Remley

Distribution: Counsel of Record

Thomas M. James, #98106
Arizona State Prison
ASPC-Douglas, Mojave North
P.O. Box 5002
Douglas, AZ 85608



IN THE
COURT OF APPEALS OF INDIANA

FILED

OCT - 5 2011

THOMAS M. JAMES,)
vs.) CAUSE NO. 33A05-1104-CT-238
DR. LORENZO ELI, et al.,)
Appellee.)

Margot A. Ross

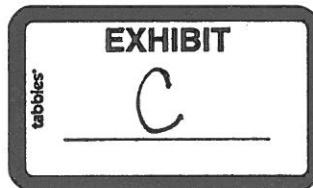
ORDER

The Notice of Completion of Transcript was due to be filed no later than June 24, 2011. Appellant has failed to timely seek an order to compel the issuance of the Notice of Completion of Transcript, and this appeal is subject to dismissal. See Ind. App. R. 10(G).

Having reviewed the matter, the Court FINDS AND ORDERS AS FOLLOWS:

1. This appeal is DISMISSED WITH PREJUDICE.
2. The Clerk of this Court is directed to send copies of this order to the parties, the trial court, the Henry Circuit and Superior Courts Clerk.
3. The Henry Circuit and Superior Courts Clerk is directed to file a copy of this order under Lower Cause Number 33D01-1011-CT-14, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

ORDERED this 5th day of October, 2011.



Margot A. Ross

Chief Judge